

BEFORE THE
ILLINOIS COMMERCE COMMISSION

THE DEPARTMENT OF TRANSPORTATION) DOCKET NO.
OF THE STATE OF ILLINOIS, for and) T09-0018
on behalf of the People of the)
State of Illinois,)
Petitioner,)
v.)
THE KANSAS CITY SOUTHERN RAILROAD)
COMPANY and the UNION PACIFIC)
RAILROAD COMPANY,)
Respondents.)

Petition to construct FAP Route 310(ILL Route 255) near the Village of Godfrey, Madison County, Illinois, and to construct two grade separation structures to carry ILL Route 255 over and across the Respondents' mainline tracks at approximate UP milepost 251.5

Springfield, Illinois
Tuesday, April 7, 2009

Met, pursuant to notice, at 1:00 p.m.

BEFORE :

MR. DEAN JACKSON, Administrative Law Judge

SULLIVAN REPORTING COMPANY, by
Carla J. Boehl, Reporter
Lic. #084-002710

1		<u>I N D E X</u>		
2	<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u> <u>RECROSS</u>
3	None .			
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10				
11		<u>EXHIBITS</u>		
12			<u>MARKED</u>	<u>ADMITTED</u>
13	KCS 8		98	98
14	KCS 10		98	98
15	KCS 11		98	98
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1 for Union Pacific Railroad at 100 North Broadway,
2 Suite 1500, St. Louis, Missouri 63102. Phone number
3 331-0566, area code 314.

4 JUDGE JACKSON: Thank you. Mr. Von De Bur?

5 MR. VON DE BUR: Joe Von De Bur, Railroad
6 Safety Specialist with the Illinois Commerce
7 Commission, 527 East Capitol Avenue, Springfield,
8 Illinois 62701.

9 JUDGE JACKSON: Thank you. All right. We were
10 last together on this case on March 12, 2009. On
11 that date we did hear evidence on the issues raised
12 in the case. I see from the prefiled exhibits -- I
13 have not read them all, make no mistake. The
14 prefiled exhibits from the Kansas City Southern looks
15 as if since we were together last time depositions of
16 Mr. Michael D. Busch, B-U-S-C-H, and Mr. Stephen,
17 S-T-E-P-H-E-N, Stull, S-T-U-L-L, were taken. I am
18 wondering where we are. Are we in full blown
19 contested case at this point? Mr. Parrish?

20 MR. PARRISH: Well, Your Honor, there was a
21 letter dated March 27 submitted to Mr. Jeffery in
22 which the Department laid out what we believe is a

1 compromise position. This letter was sent in
2 response to their previous letter of February 13.

3 And depending on, I guess, what their
4 response would be to that, then we would be in full
5 blown contested mode, I guess, Judge. But we have
6 not received the response. Admittedly, again, the
7 letter was dated March 27. So that hasn't given them
8 a whole heck of a lot of time to respond. So I guess
9 now is as good a time as any to see what, if any,
10 response there is to it.

11 JUDGE JACKSON: Okay. Mr. Jeffery?

12 MR. JEFFERY: Yes, Judge, just to kind of put
13 everything into context, I think when we were all
14 together at the previous hearing date, you know,
15 Mr. Fleis testified and some issues came up about the
16 location of a fiber optic cable, and you specifically
17 asked the parties, you know, that you wanted some
18 evidence on the record concerning the fiber optic
19 cable.

20 So afterwards, you know, counsel
21 conferred after the hearing, and we thought it would
22 be a good idea to take a couple of depositions of

1 Mr. Busch who works for a company called Oates
2 Company who is IDOT's outside contractor for utility
3 relocation issues and also someone from MCI since it
4 is a Verizon/MCI cable which is what, you know, was
5 the subject of contention.

6 And I guess at this point what I could
7 do is just offer into the record these depo
8 transcripts. What I would like to do is offer the
9 transcript for Mr. Busch as, should be, KCS Exhibit
10 Number 8. Hand that to the reporter. Because I
11 think at the prior hearing date we had exhibits KCS 1
12 through 9 but there was no Number 8. So I am filling
13 in the gap with that.

14 Also then KCS Exhibit Number 10 would
15 be an affidavit. It's a business record affidavit
16 for Mr. Stull. And then the next exhibit in order
17 would be the deposition transcript for Mr. Stull.
18 And I would ask that those be received --

19 JUDGE JACKSON: Number 11?

20 MR. JEFFERY: Yes, that would be Exhibit Number
21 11, and copies have been provided to counsel, and I
22 would ask that those be accepted.

1 MR. VON DE BUR: I have no objection, Your
2 Honor.
3 JUDGE JACKSON: Are there any objections?
4 MR. PARRISH: Without objection, Judge.
5 JUDGE JACKSON: Good.
6 MR. PARRISH: Without objection, yes.
7 JUDGE JACKSON: Good, good, good. All right.
8 Exhibit Number 8 was the deposition of Busch, right?
9 MR. JEFFERY: Yes.
10 JUDGE JACKSON: Give her time to mark them.
11 (Whereupon KCS Exhibits 8, 10
12 and 11 were marked for purposes
13 of identification as of this
14 date.)
15 JUDGE JACKSON: All right. The exhibits will
16 be admitted without objection.
17 (Whereupon KCS Exhibits 8, 10
18 and 11 were admitted into
19 evidence.)
20 JUDGE JACKSON: Mr. Jeffery, any response,
21 official or unofficial, or no response at this point
22 to the letter of March 27, 2009, of which Mr. Parrish

1 spoke?

2 MR. JEFFERY: Again, to put the letter into
3 context, we conducted the depositions of the two
4 individuals.

5 JUDGE JACKSON: Were they done after the letter
6 came out?

7 MR. JEFFERY: No, they were done before. I
8 think the letter is kind of in response to what came
9 out of the depositions.

10 JUDGE JACKSON: All right.

11 MR. JEFFERY: So, again, just to try to put all
12 this in context, so we deposed the MCI individual who
13 is a right-of-way specialist in charge of relocating
14 things and IDOT's own contractor. And as it turns
15 out, referring back to the one, I think, exhibit that
16 we used at the earlier hearing date which showed the
17 cross section of the current IDOT configuration,
18 underneath a temporary sheet piling, just to the east
19 of the western pier, there is an MCI fiber optic
20 cable located directly underneath where IDOT proposes
21 to put a temporary sheet piling.

22 So the two witnesses testified there

1 were three options available to IDOT to deal with
2 that. Number one would be relocate 3.45 miles of
3 fiber optic cable at a cost estimated of, I think it
4 was, approximately \$570,000. Option 2 would be move
5 the temporary sheet piling closer to the western
6 pier. However, Mr. Busch noted there is only four
7 feet available to do that, so it may not be possible
8 to do that. And then both witnesses -- or Mr. Busch
9 testified that the third option would be for IDOT to
10 redesign that portion of the overpass anyway.

11 So as a result of that, a week or so
12 went by and I received a letter from IDOT, and it
13 basically -- they reversed their earlier position
14 that says, well, no, we don't think it is possible to
15 change the 45-degree concrete wall to a vertical
16 abutment to allow KCS the opportunity to put in
17 additional track. This most recent correspondence,
18 you know, it said, well, we have reviewed your plans
19 and we have changed our mind. There is room to put
20 in this vertical abutment to afford you the
21 opportunity to put in this additional track.
22 However, we are willing to do that if you pay all of

1 the engineering and all of the construction costs to
2 do that.

3 Our KCS -- I am advised KCS management
4 is reviewing that, and I don't know what the final
5 decision is. We were talking about that earlier this
6 morning. It just hasn't had time to go through the
7 motions internally. But, you know, I think this
8 raises another set of questions, is what is IDOT
9 going to do with respect to the fiber optic cable.
10 Because if they were going to choose the option of
11 redesigning portions of the overpass project such as
12 to move the western pier or move the location of the
13 temporary sheet piling, there is going to be certain
14 costs incurred anyway with respect to additional
15 engineering, additional construction.

16 So, and again I am just speaking
17 unofficially here, but if that's the situation, if it
18 is going to be redesigned and re-engineered anyway,
19 it may not be fair and reasonable for KCS to absorb
20 one hundred percent of those costs. So that's kind
21 of where KCS is at this point. Really the only
22 missing information is what's IDOT going to do with

1 the MCI fiber optic cable.

2 JUDGE JACKSON: Before I get back to you,
3 Mr. Parrish, any off-the-wall estimate of what the
4 new engineering costs, etc., would amount to? I
5 mean, I don't have a clue.

6 MR. JEFFERY: We really haven't crunched those
7 numbers to do that.

8 JUDGE JACKSON: Mr. Parrish?

9 MR. PARRISH: Yes, Your Honor, I think counsel
10 just slightly misstates the facts. We have never
11 said that it would be impossible to do. And that
12 upon further consideration we came up with an idea
13 that would allow us to make the necessary letting
14 date and not lose the funding and still accommodate
15 the request.

16 Our position is, and always has been,
17 that our plans were based on previous agreements from
18 KCS as far back as 2005. And there was no mention in
19 2005 when they approved a variance on their
20 engineering standards for the vertical clearance on
21 the overpass, there was no mention then of a
22 retaining wall and space for a future track. And we

1 acted in reliance on that, and we came up with the
2 plans that were sent to them in September of 2008.
3 And now at this point in the game we are hearing
4 about the retaining wall and the extra track and so
5 forth.

6 So, okay, we understand things change.
7 But what we want to do is we are going to incur
8 significant costs in redesigning and coming up with
9 new plans. Cost is not the issue as much as time in
10 this situation, Judge. Because it is imperative that
11 we meet this date. If we don't, we will lose the
12 funding. The source of funding is from the federal
13 government. And we will lose that funding. And so
14 that is our focus in this entire thing.

15 JUDGE JACKSON: Yeah. Well, my position here
16 today is not to play the blame game, certainly not
17 yet, anyway. I don't see the need. But rather to
18 hopefully try to help facilitate, you know, a decent,
19 fair and equitable resolution of the problems that
20 have arisen, whether they arose in 2005 or in 2008 or
21 9, and hopefully preserve the federal funding.

22 I am wondering -- and I don't mean to

1 ignore Union Pacific and Staff at this point yet, but
2 I will. We will get to you. I am wondering if maybe
3 -- and I do understand time is of the essence. I am
4 wondering maybe if, since Mr. Jeffery is basically
5 just -- there is no official response from KCS yet
6 and I am thinking there might still be some ground
7 for negotiations, and I certainly understand the
8 Railroad's desire not to be stuck with all these
9 costs.

10 I am wondering if maybe -- what is
11 this April 7, 6 -- if I gave you another couple of
12 weeks to put together an official response, I mean
13 you guys know time is of the essence, and maybe set
14 this down for another hearing in three weeks and find
15 out what it is. And if there is still disagreement,
16 then at that hearing we would put in the final
17 evidence of the case and I will make a decision
18 either way. I mean, that's my thought.

19 MR. JEFFERY: Well, KCS is certainly -- we
20 certainly appreciate, you know, IDOT's concerns and
21 the timing of all this, and no one wants to lose out
22 on any federal funding for the project and

1 everything. And so I certainly appreciate the
2 comments that Mr. Parrish made.

3 However, really, the only missing
4 piece of factual information is what -- and
5 Mr. Parrish unfortunately did not address that -- is
6 what is IDOT's position with respect to the MCI fiber
7 optic cable. As their contractor said, they have
8 three options. We just would like to know -- and I
9 think that might affect our decision making -- what
10 their plan is.

11 JUDGE JACKSON: What was the second option
12 again? I have the first and the third.

13 MR. JEFFERY: One was the first option would be
14 to relocate the cable three and a half miles. The
15 second option would be to see if they could shift,
16 move the temporary sheet piling closer to the western
17 pier. But there is only apparently a four-foot
18 distance to do that. So engineering-wise they didn't
19 know or Mr. Busch didn't know if that was feasible or
20 not. He did indicate last week there was going to be
21 another site meeting involving IDOT and its engineers
22 there to determine the viability of that particular

1 option. So I have not heard -- I don't know what the
2 outcome of that site meeting was.

3 JUDGE JACKSON: All right.

4 MR. JEFFERY: And the third option being just
5 re-engineering things to move everything around.

6 MR. PARRISH: In regards to the question about
7 the site, the site appearance that took place, Kirk,
8 could you address that? Did one happen? I think we
9 talked on the phone yesterday.

10 MR. BROWN: Sure. We had a -- there was a
11 field meeting where we did meet on site, laid out the
12 footing, the foot prep to see where it is, and they
13 only were able to check the marks of where the fiber
14 optic line is on the surface, so that's fairly
15 accurate.

16 As Mr. Jeffery mentioned, there will
17 be a follow-up meeting or we are trying to arrange
18 one, where we hope to be able to excavate, find out
19 exactly where that MCI line is and find out if it is
20 in conflict or not.

21 But for the Department's sake, the MCI
22 fiber is essentially a non-issue. If it is in the

1 way, we will move it. Those costs will not be
2 related to KCS at all. Those are IDOT's
3 responsibilities. It also does not throw us off of
4 meeting that letting date.

5 The only issue -- and the pier will
6 not be, even if we have to move the MCI fiber, the
7 pier will not be redesigned or moved. So we are not
8 contemplating redesigning the bridge at all. As
9 Larry stated, we are trying to move forward.

10 JUDGE JACKSON: All right. I am going to give
11 you three weeks, all right. We are going to set this
12 down for another three weeks. And you guys get the
13 engineers out there. You decide -- I mean, I am
14 hearing some good stuff here, I think, if I am
15 accurate in what I heard, that IDOT is going to take
16 care of whatever it costs to do the fiber optic, no
17 matter what, and they are not going to look to the
18 railroad.

19 MR. PARRISH: No.

20 JUDGE JACKSON: Because that to me would be
21 huge. I think we mentioned at the last hearing, we
22 have had dealings with fiber optics before, and

1 that's enough said. History is history.

2 So I am going to give you three weeks.
3 We are going to set it down again. And when we come
4 back together, you guys either have an agreement or,
5 if not, put on whatever evidence you have left. That
6 will give me a chance to read all the depositions,
7 and I will make the decision. If one is not made by
8 you guys, I will make it. And then we will go to --
9 that will give us enough time to go to a proposed
10 order because you have 14 days and 7 days to file
11 objections to whatever I come up with. And then I
12 put it in a final form for the Commission and it will
13 be done. So that will be our last shot, the next
14 three weeks, to get in agreement. And if you don't,
15 I will make the decision.

16 Fair enough?

17 MR. PARRISH: Very good.

18 JUDGE JACKSON: Mr. Jeffery?

19 MR. JEFFERY: Fine.

20 JUDGE JACKSON: Now let's ask what Mr. Farwell
21 and Mr. Von De Bur think. Is that all right with
22 you, Mr. Farwell?

1 MR. FARWELL: That's all right. I guess I am a
2 little unclear as to what we are going to accomplish
3 in the next three weeks.

4 JUDGE JACKSON: Well, they are going to talk,
5 number one, because we have the March 27 letter that
6 came out at or about the time the depositions were
7 taken. And I don't think the railroads had enough,
8 KCS, has had enough time to adequately respond to it,
9 and then we hear today maybe some new information
10 that, railroad, don't worry about paying for the
11 fiber optic, we will move it. So it's to give them
12 time to go out. If they need to excavate, you have
13 got three weeks before I split the baby, however I
14 decide to do that.

15 MR. FARWELL: My concern is, and it somewhat
16 depends on what they find at this next site visit, if
17 they were to find that they did need to move the
18 cable and therefore they are talking about IDOT
19 having to eat \$570,000 worth of extra costs, whether
20 -- and I have no idea of what are the re-engineering
21 costs and the redesign costs of changing the pier
22 locations, but if they are less than \$572,000,

1 shouldn't that be considered? I mean, that's the
2 only thing that I am concerned about. And whether or
3 not we can reach any conclusion on that in three
4 weeks, I don't know.

5 MR. BROWN: Again, for us -- I am sorry if I am
6 speaking out of turn. For us it is not so much the
7 costs. The cost is important. But to redesign the
8 pier would take probably an estimate of six months or
9 so to redesign the entire bridge, given the pier. We
10 don't have that time frame. For us it is the time.

11 MR. FARWELL: I see.

12 JUDGE JACKSON: As long as they are not asking
13 Union Pacific for money, you should be happy. But
14 make sure you include Union Pacific when you guys
15 have meetings. Make no mistake.

16 Mr. Von De Bur?

17 MR. VON DE BUR: So the issue at this point is
18 whether you have an open abutment or a closed
19 abutment?

20 MR. BROWN: No, it won't be a closed abutment.
21 It is just that KCS has requested space for a future
22 track. We have looked at the design and said that it

1 is feasible. We do have room. That's never been an
2 issue. It is just the lateness of the suggestion, if
3 we have been served it too late.

4 So now there is room, we can do it,
5 but we have asked KCS to bear the costs in that we
6 have relied on their preliminary approval.

7 MR. VON DE BUR: And that does not affect the
8 basic structural design as it is now?

9 MR. BROWN: It does not, no.

10 JUDGE JACKSON: I am going to go around the
11 table once more. And then I'll run upstairs and get
12 my calendar. We'll go off the record and then pick
13 another date.

14 Mr. Parrish, any final comments, any
15 closing statement for the day, if you will?

16 MR. PARRISH: No, Judge.

17 JUDGE JACKSON: Thank you. Mr. Jeffery, any
18 final comments?

19 MR. JEFFERY: No, sir.

20 JUDGE JACKSON: Mr. Farwell?

21 MR. FARWELL: Actually, Mr. McKernon had a
22 question, I think.

1 MR. MCKERNON: Well, a couple things. It's a
2 shame that the bridge isn't what it should be and
3 that's clear spanning the right-of-way. We are
4 stepping on two Class 1 railroads here trying to do
5 business in the state of Illinois. My big question
6 is, is what plans have been approved.

7 JUDGE JACKSON: I am going to let you guys talk
8 about that on your own with the engineers, site visit
9 or whatever. That's not for today. Anything else?

10 MR. MCKERNON: No, sir, appreciate the offer.

11 JUDGE JACKSON: You are welcome. Mr. Von De
12 Bur, closing comments?

13 MR. VON DE BUR: I have nothing, Your Honor.

14 JUDGE JACKSON: All right. Let's go off the
15 record. I will go upstairs, check the room and make
16 sure we have you in Chicago, Mr. Parrish. And let's
17 look three weeks out.

18 (Whereupon there was then had an
19 off-the-record discussion.)

20 JUDGE JACKSON: Back on the record. We are
21 continued to 1:30 in the afternoon Wednesday, April
22 29, audio-visual room, Chicago, Springfield. Thanks,

1 everyone.

2 (Whereupon the hearing in this
3 matter was continued until April
4 29, 2009, at 1:30 p.m. in
5 Springfield, Illinois.)

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